Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1993

JODY WAYNE ARDOIN,

Petitioner,

versus

SEACOR MARINE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the lower courts err in applying the wrong legal standards for negligence and causation in a seaman's suit under the Jones Act, 46 U.S.C. § 688?

LIST OF INTERESTED PERSONS

Counsel for petitioner, Richard J. Arsenault and Galen W. McBride of the firm, Neblett, Beard & Arsenault, certify that the following listed parties have an interest in the outcome of this case. This representation is made pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States:

Jody Wayne Ardoin	Complainant
Mr. Richard J. Arsenault Mr. Galen W. McBride The Law Firm of NEBLETT, BEARD & ARSENAULT	Attorneys for Complainant
Seacor Marine, Inc.	Defendant
Mr. Edwin C. Lazier Mr. Mark J. Spansel ADAMS & REESE	Attorneys for Defendant, Seacor Marine, Inc.

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REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, in this matter in an unpublished decision designated Docket No. 92-5281, Jody W. Ardoin v. Seacor Marine, Inc. The opinion of the United States District Court for the Western District of Louisiana in an unrecorded opinion, Docket No. 91-0290, Jody W. Ardoin v. Seacor Marine, Inc.

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under Article III of the United States Constitution and 28 U.S.C. § 1254, and the basis on which this Petition is predicated are Rules 10 of the Rules of the Supreme Court of the United States.

Petitioner's claim under the Jones Act was disposed of by a judgment after a trial on the merits on 9th day of November, 1992. All claims were disposed of by this judgment and the final judgment was rendered by the Honorable Richard J. Putnam on the 8th day of December, 1992. A timely appeal to the United States Court of Appeal for the Fifth Circuit was perfected. The judgment of the U. S. District Court was upheld by a three member panel of the United States Court of Appeals for the Fifth Circuit on the 1st day of October, 1993.

These writs have followed.

STATEMENTS OF STATUTES INVOLVED

This matter involves the interpretation of the following statutes or jurisprudence:

A. 46 U.S.C.A. § 688(a), more commonly referred to as the Jones Act and the burdens of proof upon petitioner from the application of that statute.

STATEMENT OF THE CASE

(I) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT

On February 11, 1991, Jody Wayne Ardoin, complainant/appellant herein, filed a complaint in the United States District Court, Western District of Louisiana. Named as defendant was Seacor Marine, Inc. The claim was brought pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law.

The matter came to trial on November 9, 1992. Judge Richard J. Putnam ruled in favor of the defendant.

This appeal was had to the Fifth Circuit Court of Appeal which court on October 1, 1993 affirmed the decision of the district court. This application of writ of certiorari followed.

(II) STATEMENT OF THE FACTS

Appellant, Jody Wayne Ardoin, was employed as a mate aboard the M/V SEA ISLAND, a vessel owned, maintained and operated by the defendant, Seacor Marine, Inc. (Seacor). On October 10, 1990, during his

tenure as a Seacor employee, Ardoin sustained severe and disabling injuries while in the course and scope of his duties as a mate aboard the M/V SEA ISLAND.

On the morning of Ardoin's accident, the M/V SEA ISLAND was docked. At approximately 5:30 a.m., Ardoin was disembarking from the vessel when he was injured while descending an interior staircase which ran from the second deck (which housed the crew quarters) to the galley deck where the exit was located. At that time, Ardoin had worked only seven (7) days aboard the M/V SEA ISLAND, but had been employed by Seacor aboard its fleet of vessels for the previous three years. He had succeeded in attaining his mate's license only weeks before the accident. Ardoin is presently twenty-four years of age and is married with a one-year old child.

The vessel's unseaworthiness and Seacor's negligence caused Ardoin to fall down the stairs in question. The fall was caused primarily by the worn and frayed condition of the non-skid tape covering a portion of each tread on the stairwell. Other contributing factors were the poor overhead lighting (it was dark outside at the time), and an accumulation of foreign substances on the stairs from the foot traffic of previous days.

Shortly before his accident, at the beginning of his hitch, Ardoin had been instructed by his Captain to replace non-skid tape throughout the vessel. An independent witness, Mike Sampson (who is still employed by Seacor and obviously has no incentive to assist Ardoin), testified that the non-skid material was worn out and that he and Ardoin were indeed in the midst of replacing

same. Another witness, the ship's cook, Patricia Steinauer, also testified that the non-skid tape was wearing out. Due to the vessel's inadequate supply of materials, Ardoin ran out of the non-skid tape before completing his task, leaving the stairwell in question covered with old, worn tape.

As a result of the accident, Ardoin suffered debilitating injuries to his back and left shoulder and has not worked since that time. Ardoin underwent a left shoulder reconstruction on January 16, 1991. In March of 1992, he underwent a double level lumbar fusion with an additional single level nerve root decompression. Dr. John Cobb (orthopaedic) assigned Ardoin a twenty-eight (28%) percent whole body disability as a result of the shoulder and lumbar spine injuries. These injuries, and the resulting permanent disability, prevent Ardoin from ever returning to his chosen field of maritime work.

ARGUMENT

The appellate court has erred in upholding the trial court's ruling. Their affirmance perpetuates the trial court's misapplication of applicable legal standards (Appellate court opinion, Appendix A). The issue is simply that the trial court failed to apply the familiar Jones Act "slightest negligence" and featherweight burden of proof standards. The appellate court notes that this is the correct standard yet inexplicably failed to recognize the district court did *not* apply this standard nor the concomitant standard that a seaman's duty to protect himself is only slight. Further, once the trial court applied the

wrong legal standard, the appellate court mistakenly gave its findings benefit of the "clearly erroneous" standard.

CORRECT STANDARD TO BE APPLIED

The district court's opinion (Appendix B) is not couched in terms of the culpability of an employer for the "slightest possible negligence" or the slight care a seaman must exercise in looking out for his own safety. In fact, the trial court finds the non-skid tape was worn (Appendix B pg. 7), but concludes that plaintiff failed to exercise ordinary care, which lack caused his fall.

It is a basic tenet of a seaman's maritime claim that a seaman's duty to protect himself is slight. *Colomb v. Texaco, Inc.*, 736 F.2d 218 (5th Cir. 1984); *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175 (5th Cir. 1983); *Savoie v. Otto Candies, Inc.*, 692 F.2d 383 (5th Cir. 1982); *Bobb v. Modern Products, Inc.*, 648 F.2d 1057 (5th Cir. 1981); *Pickle v. Int'l Oilfield Diver Inc.*, 791 F.2d 1237 (5th Cir. 1986).

The trial court's holding that the sole legal cause of Ardoin's fall was his own lack of ***ordinary*** care is erroneous. The appellate court's acquiescence in this holding sub silentio overrules well established jurisprudence to the manifest prejudice of injured seamen. The ruling allows negligent employers to escape their customary duties, imposes unrealistic and unfair burdens on seamen, and leaves injured seamen without an effective remedy for the risks inherent in maritime employment.

It is axiomatic that seamen are wards of the Admiralty court and entitled to its special solicitude. *James H. Shrigley*, 50 F.287 (N.D.N.Y 1892). This policy has been of paramount concern to the courts since time immemorial and remains so today. In furtherance of this basic policy, liberal remedial legislation in the form of the Jones Act, 46 U.S. 688, provides to the injured seaman a remedy that includes lesser standards of causation and negligence as well as a featherweight burden of proof. Policy reasons for this include the employer's total control of the work environment and duties as well as the dangerous nature of the enterprises. See *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988), cert. denied, 488 U.S. 968 (1988); *Landry v. Oceanic Contractors, Inc.*, 731 F.2d 299 (5th Cir. 1984); *Davis v. Hill Engineering Inc.*, 549 F.2d 314 (5th Cir. 1977).

At the close of the plaintiff's case, the trial court observed that "ample evidence" of negligence and unseaworthiness had been adduced (Appendix B, pg. 2). However, the district court then failed to apply the correct legal standards to its correct factual observations. The appellate court continued the misapplication of the more burdensome traditional legal standard for negligence. (See appellant's brief in the 5th Circuit, Appendix A). The appellate court then compounded its error by incorrectly applying the "clearly erroneous" standard of review to a trial court ruling which was based on a misapprehension of the law. *Delta S.S. Lines Inc. v. Avondale Shipyards Inc.*, 747 F.2d 995 (5th Cir. 1984).

CONCLUSION

This is a maritime injury brought under the Jones Act. Accordingly, the seaman is entitled to what is well nigh his due; the lessened standards of causation and negligence and a reduced burden of proof. The failure to apply these standards is clear and reversible error. Further, as stated in *Delta, supra,* an appellate court is not bound to the clearly erroneous standard of review when the court below has applied the wrong law.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 92-5281

Summary Calendar

JODY W. ARDOIN,

Plaintiff-Appellant,

VERSUS

SEACOR MARINE, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

Before WISDOM, JOLLY, and JONES, Circuit Judges.

PER CURIAM:*

This case concerns an injured seaman. We hold that the district court was not clearly erroneous in finding that "the negligence lies solely at the door of Plaintiff himself." We AFFIRM the district court.

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* Local Rule 47.5.1 provides:
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

The plaintiff, Jody Ardoin, was a mate aboard the M/V Sea Island, a vessel owned, maintained, and operated by the defendant, Seacor Marine, Inc. At the time of the accident, Ardoin had worked for Seacor for more than three years and had been on the M/V Sea Island for one week.

At approximately 5:30 a.m. on the morning of October 11, 1990, Ardoin fell while descending an interior staircase. As a result of his accident, Ardoin suffered debilitating injuries to his back and shoulder and has not worked since that time.

Ardoin filed suit in federal court under the Jones Act, 46 U.S.C. § 688, and general maritime law. Ardoin waived his right to a jury and the case was tried to Judge Putnam in November 1992. The district court granted judgment for Seacor on both the Jones Act negligence claim and the unseaworthiness claim. This appeal followed.

II.

As this Court has stated on several occasions, "'questions of negligence and proximate cause in admiralty cases are treated as fact questions' in respect to which a trial court's 'findings will not be reversed unless found to be clearly erroneous'"[1]

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[1] *Gavagan v. U.S.*, 955 F.2d 1016, 1019 (5th Cir. 1992) *quoting Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 727-28 (5th Cir. 1980).

III.

Ardoin contends that the non-skid tape on the steps was worn, that the steps were too narrow and steep, and that there was inadequate lighting. The district court found that none of these conditions contributed to Ardoin's fall.

At trial, Ardoin described the non-skid tape as "worn, torn, peeling, smooth and slick, frayed."[2] The district court contrasted the articulateness of this description with Ardoin's narration of his fall in the accident report for Seacor. Ardoin wrote that he fell while coming down the stairs carrying his bag of clothes. He did not mention that he slipped or tripped on non-skid tape. Indeed, Ardoin's original complaint did not mention inadequate non-skid tape. Further, Ardoin's witness as to the condition of the tape contradicted himself. On direct examination, this deckhand (Michael Sampson) said that the tape was worn,yet on cross-examination, he indicated that the tape was still "pretty good."[3] This witness also contradicted Ardoin's testimony that the vessel had run out of non-skid tape so that the crew could not complete the task of periodically replacing the tape, a task which Ardoin had been undertaking in the days before his fall.

Several witnesses including Sampson testified that the lighting was adequate. Several different lights illuminated the stairwell, and a marine engineer testified that the lights not only met Coast guard standards, but also

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[2] Rec. Vol. 4, p. 15.

[3] Rec. Vol. 4, p. 112.

met good naval architecture and marine engineering standards.

The issue whether the steps were too steep or too narrow, which was raised for the first time at trial, suffers similarly from contrary and convincing testimony that the steps were properly designed. Further, the steps had a raised diamond pattern tread, so that even without non-skid tape, it is a slip-resistent surface.

It is unknown whether Ardoin used the handrail in descending the stairs. He testified that he could not remember and displaced a poor recollection of the number of handrails despite the fact that he frequently used the stairwell during his short stint on board the M/V Sea Island.

IV.

Jones Act negligence and unseaworthiness require different standards of causation.[4] Under the Jones Act, the defendant is liable "if his negligence played any part, even the slightest, in producing the injury."[5] "The standard for causation for unseaworthiness is a more demanding one" yet in either case the plaintiff bears a light burden of establishing causation.[6] Even under the

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[4] *Chisholm v. Sabine Towing & Transp. Co., Inc.*, 679 F.2d 60, 62 (5th Cir. 1982).

[5] *Id.*

[6] *Id.*

Jones Act, however, the plaintiff must establish more than mere "but for" causation.[7]

Ardoin has failed to meet his very light burden of establishing legal causation for even his Jones Act claims much less the higher burden for his unseaworthiness claims. The condition of the tape is Ardoin's best evidence, and it, although worn, was not in a condition to create the "substantial factor" leading to Ardoin's fall which is necessary to qualify as legal causation. While one has empathy for Ardoin, his own conduct in descending the stairs is the sole legal cause of his fall. We therefore AFFIRM the judgment of the district court.

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[7] *Gavagan* at 1019-20. *See Spinks v. Chevron Oil Co.*, 507 F.2d 216, 222 (5th Cir. 1975).

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

JODY WAYNE ARDOIN	**CIVIL ACTION**
VERSUS	**NO. CV91-0290-L**
SEACOR MARINE, INC.	**JUDGE PUTNAM** **MAG. TYNES**

MEMORANDUM OPINION

In this case, Plaintiff, Jody Ardoin, was injured on October 11, 1990 when he fell down a stairway aboard the M/V Sea Island upon which he was serving as mate. The M/V Sea Island was owned and operated by the Defendant Seacor Marine, Inc. At the time of the accident the vessel was standing by at the dock and Plaintiff was preparing to go ashore on a regularly scheduled crew change. The stairwell in question is approximately thirty inches wide and goes down from the crew's quarters on the forecastle deck to the galley below on the main deck of the Sea Island. Plaintiff testified that he was descending the stairs carrying his duffel bag with his clothes in it just before going home. He does not remember whether or not he was holding the handrail and under all of the facts and circumstances of this case, the court concludes that the Plaintiff was not holding the handrail as he proceeded down the steps.

There were no witnesses to the actual occurrence of this accident. The incident took place around 5:30 a.m. and most of the crew members were still sleeping. The

evidence is conflicting and leaves much to be desired. The Court is aware that at the close of Plaintiff's evidence, Defendant moved for judgment as a matter of law and this motion was denied by the Court, stating at that time that there appeared to be "ample" evidence in the record from which the Court might conclude there was negligence on the part of the Defendant and/or that the vessel in question was unseaworthy. At this time the Court wishes to make it clear that it had not had time to fully evaluate all of the testimony of Plaintiff and his fact witnesses, and, as will be pointed out below, that opinion has changed.

One of the central issues in this case is whether or not the non-skid tape on the stairs in question was worn smooth, frayed or torn so as to be no longer serviceable. The steps are constructed of steel plates 7¾" wide with a diamond pattern to provide a non-skid surface without the addition of non-skid tape. However, it was the practice of the captain of the "Sea Island" to use strips of abrasive non-skid tape to increase traction on the stairs, which strips are four inches wide by thirty inches long, which is the width of each step from wall to wall at the stairway.

In addition to the Plaintiff, Jody Ardoin, the cook at the time the incident took place was called as a witness in his behalf. She testified that she had worked for Seacor Marine on the M/V Sea Island for approximately two years and that she had been aboard this vessel about one year at the time the accident happened. She also said that she did not see Plaintiff fall, that she was in her room asleep at the time, and she repudiated two previous statements given by her that she was sitting in the gallery

when Ardoin fell. Her testimony at the time of trial was that the statements were wrong – she had been mistaken. She said that the steps they were talking about were those going to the crews' quarters above the galley, and that she never used those steps. As a consequence, her testimony is valueless. The statements are not admissible in evidence because she admitted having given them.

Another witness called by the Plaintiff, Michael Sampson, a deckhand, stated that he worked with Ardoin on the vessel and that he was in bed at about 5:30 in the morning on October 11 when he heard a loud noise like a stumble on the stairs. He did not see anything or anybody fall down the stairs. On direct examination the witness testified that the non-skid tape on the steps was worn out and torn and was not good. On the other hand, on cross examination his testimony was to the effect that the non-skid tape on the stairs where the accident occurred was still good enough to use, thus contradicting himself on this important point.

Plaintiff himself testified that he slipped and fell on the second step down at the top of the stairwell. It was also his testimony that the non-skid tapes were due to be changed, that they were in the process of changing them just before the crew change took place but they ran out of tape and could not complete the job on the stairs going down into the galley. His witness, Mike Sampson, said that he did not remember running out of the tape while on board the motor vessel M/V Sea Island.

Plaintiff further testified that when he fell the non-skid tape "was worn, torn, smooth, and frayed, and it was also peeling and was slick," or words to that effect.

Plaintiff is a very articulate person, and it is most unusual that he did not avail himself of his talent when he filled out the two accident reports following his fall, one in the galley aboard the M/V Sea Island, and one on the dock for Conoco. In the accident report for Seacor Marine, Inc., when furnishing a description of how the "accident/ injury occurred," Plaintiff wrote "I was coming down the stairs to the galley and fall (sic). I was carying (sic) my bag of clothes.", and in the report for Conoco, in response to the question "WHAT HAPPENED?. . . . . " his handwritten answer was "I was coming down the stairs to the galley and fell. I had a bag in my hand." Had he slipped or tripped on "worn, torn, frayed, and peeling non-skid tape", he would surely have mentioned it to the captain and also to the Conoco man on the dock.

He could not remember how many handrails there were in the stairwell although on page 4 of his deposition he stated that there was only one handrail. He also testified that he did not remember whether he was using the handrail or not but said he was in the habit of doing so. Considering all of the testimony, the Court finds that the non-skid tape on the stairs where Plaintiff fell, while it had been in use for some time and was worn, but not frayed and torn in such a manner as to cause a person exercising ordinary care for his own safety to stumble or slip and fall down the stairs. Rather, we are forced to the conclusion that the cause of the accident in this case was the fact that Plaintiff was carrying his duffel bag down the stairwell and not using at least one of the hand rails provided. The negligence lies solely at the door of Plaintiff himself and his failure to observe ordinary care for his

own safety in order to avoid injury to himself while descending the stairs.

There is no question that Plaintiff suffered serious injuries to his shoulder, resulting in reconstructive surgery, and that a pre-existing condition of his back was aggravated by his fall. While the medical evidence is conflicting on the latter point, we find this to be the case and as a result of this aggravation he also underwent a spinal fusion at the L-3, 4 and L-4, 5 levels and a nerve root decompression operation at the L-5, S-1 level. He had not yet recovered from these operations at the time of trial, and the point at which he may return to some type of gainful occupation is as yet not established.

While we sympathize with Plaintiff, we are guided in our decision by well recognized principles of maritime law. So far as the claim under the Jones Act for negligence is concerned, Plaintiff must prove not only that there was negligence on the part of his employer, Seacor Marine, Inc., but that such negligence "played any part, even the slightest, in producing the injury . . . for which damages are sought." *See Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 524, 559, 1 L.Ed. 2d 493, 515, 77 S.Ct. 443, 459, 478, reh. den. 353 U.S. 943, 1 L.Ed. 2d 764, 77 S.Ct. 808 (1957); and *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 1 L.Ed. 2d 511, 77 S.Ct. 457 (1957), and their progeny. After carefully considering all of the evidence introduced by Plaintiff and that opposed to it, we cannot say that this burden has been carried.

Plaintiff contends that the condition of the steps with frayed non-skid tape on them constituted an unseaworthy condition of the M/V Sea Island; that the steps were

too steep and the treads too narrow for safe use and therefore defective in design; and that defendant negligently permitted the condition to exist and that the captain had permitted his stores of non-skid tape to become depleted. We find these contentions to be without merit.

Nor does the Court believe that the lack of an overhead light in the stairwell itself created an unseaworthy condition on the M/V Sea Island. There was a light in the overhead in the passageway on the forecastle deck where the crews' quarters were located, as shown in the paragraph D 7-B. This light was directly above the entrance to the stairwell on that deck and provided light at the top of the stairs. On the main deck at the bottom of the stairs there was another light which was positioned so that it shed light into the stairwell at the bottom. (See photographs D-7-F and D-7-J.) While the Court recognizes that these photographs were taken with the aid of flashbulbs, we conclude from the testimony of Mr. Sargent, a marine surveyor and design engineer in New Orleans, Louisiana, along with other evidence in this case that the lack of an overhead light fixture in the stairwell itself did not render the stairs unfit for their intended use or the vessel unseaworthy. The claim for unseaworthiness must fall. *See Norris, Law of Seamen*, 4th Edition, Vol. 2, Secs. 27.8, 27.9, for a discussion of the prevailing jurisprudence in this regard.

Having reached these conclusions, we find in favor of Defendant Seacor Marine, Inc. The question of maintenance and cure was not submitted to the Court for adjudication at this time, but we are constrained to comment that Plaintiff is far from having reached maximum medical recovery from the surgery he underwent earlier this

year. This is obvious from his demeanor on the stand and in the courtroom during the trial. Payments should be continued or, if they have been stopped, should be resumed and any necessary medical treatment should be provided. We believe these matters can be resolved between the parties without further proceedings in this litigation.

JUDGMENT RENDERED at Lafayette, Louisiana this ___ day of December, 1992. Judgment will not be entered until a formal decree has been signed and filed.

RICHARD J. PUTNAM
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JODY WAYNE ARDOIN	**CIVIL ACTION**
VERSUS	**NO. CV91-0290-L**
SEACOR MARINE, INC.	**JUDGE PUTNAM** **MAG. TYNES**

JUDGMENT

After consideration of all of the evidence and in accordance with the foregoing Memorandum Opinion,

IT IS ORDERED that there be judgment in favor of Defendant Seacor Marine, Inc. and against Plaintiff, Jody Wayne Ardoin denying and dismissing Plaintiff's claims with prejudice.

All rights of Plaintiff Jody Wayne Ardoin for maintenance and cure are reserved to the Plaintiff and are not affected by this Judgment.

Lafayette, Louisiana this ___ day of December, 1992.

APPENDIX D

92-5281

IN THE UNITED STATES COURT
OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-5281

JODY WAYNE ARDOIN

Complainant-Appellant

vs.

SEACOR MARINE, INC.

Defendant-Appellee

APPEAL FROM UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
AT LAFAYETTE
HONORABLE RICHARD J. PUTNAM

APPELLANT'S ORIGINAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Seacor Marine, Inc.	Defendant
Mr. Mark J. Spansel ADAMS and REESE	Attorney for Defendant, Seacor Marine, Inc.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Complainant/Appellant respectfully requests oral argument given the multiple assignments of error and the complexity of the appropriate legal standards involved.

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STATEMENT OF JURISDICTION

Judgment was rendered by Honorable Richard J. Putnam on December 8, 1992. This final judgment was entered on December 9, 1992. Accordingly, this Honorable Court has appellate jurisdiction to review the final judgment of the Court below pursuant to 28 U.S.C.A § 1291.

STATEMENT OF ISSUES PRESENTED

1. In at least three critical areas, the trial court applied the wrong law:

   a) The trial court failed to apply the appropriate Jones Act standard of negligence, that being "the slightest bit of negligence."

   b) The trial court failed to apply the relaxed causation burden under the Jones Act.

   c) The trial court applied an incorrect standard regarding comparative negligence.

2. At one point during the trial, the Court concluded there was ample evidence to support the complainant's claim. Testimony from the only defense witness who challenged the complainant's case, was rejected by the district court. Therefore, the trial court clearly erred in holding that the defendant had rebutted the complainant's "ample" evidence in light of the trial court's own concession that there was "ample" evidence

of negligence and unseaworthiness. At the close of the complainant's case, in response to the defendant's Motion for Judgment as a Matter of Law, Judge Putnam announced:

> "There are ample facts from which the Court might determine that there was negligence on the part of the vessel in this case, negligence on part of the Captain that would remedy the failure to remedy the condition of the steps; and I want to consider the testimony without making a ruling on it."

STATEMENT OF THE CASE

(I) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT

On February 11, 1991, Jody Wayne Ardoin, complainant/appellant herein, filed a complaint in the United States District Court, Western District of Louisiana. Named as defendant was Seacor Marine, Inc. The claim was brought pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law.

The matter came to trial on November 9, 1992. Judge Richard J. Putnam ruled in favor of the defendant.

This appeal followed.

(II) STATEMENT OF THE FACTS

Appellant, Jody Wayne Ardoin, was employed as a mate aboard the M/V SEA ISLAND, a vessel owned, maintained and operated by the defendant, Seacor Marine, Inc. (Seacor). On October 10, 1990, during his

tenure as a Seacor employee, Ardoin sustained severe and disabling injuries while in the course and scope of his duties as a mate aboard the M/V SEA ISLAND.

On the morning of Ardoin's accident, the M/V SEA ISLAND was docked. At approximately 5:30 a.m., Ardoin was disembarking from the vessel when he was injured while descending an interior staircase which ran from the second deck (which housed the crew quarters) to the galley deck where the exit was located. At that time, Ardoin had worked only seven (7) days aboard the M/V SEA ISLAND, but had been employed by Seacor aboard its fleet of vessels for the previous three years. He had succeeded in attaining his mate's license only weeks before the accident. Ardoin is presently twenty-four years of age and is married with a one-year old child.

The vessel's unseaworthiness and Seacor's negligence caused Ardoin to fall down the stairs in question. The fall was caused primarily by the worn and frayed condition of the non-skid tape covering a portion of each tread on the stairwell. Other contributing factors were the poor overhead lighting (it was dark outside at the time), and an accumulation of foreign substances on the stairs from the foot traffic of previous days.

Shortly before his accident, at the beginning of his hitch, Ardoin had been instructed by his Captain to replace non-skid tape throughout the vessel. An independent witness, Mike Sampson (who is still employed by Seacor and obviously has no incentive to assist Ardoin), testified that the non-skid material was worn out and that he and Ardoin were indeed in the midst of replacing

same. Another witness, the ship's cook, Patricia Steinauer, also testified that the non-skid tape was wearing out. Due to the vessel's inadequate supply of materials, Ardoin ran out of the non-skid tape before completing his task, leaving the stairwell in question covered with old, worn tape.

As a result of the accident, Ardoin suffered debilitating injuries to his back and left shoulder and has not worked since that time. Ardoin underwent a left shoulder reconstruction on January 16, 1991. In March of 1992, he underwent a double level lumbar fusion with an additional single level nerve root decompression. Dr. John Cobb (orthopaedic) assigned Ardoin a twenty-eight (28%) percent whole body disability as a result of the shoulder and lumbar spine injuries. These injuries, and the resulting permanent disability, prevent Ardoin from ever returning to his chosen field of maritime work.

SUMMARY OF THE ARGUMENT

The court below applied the wrong law to this case. It failed to apply the correct Jones Act standards of negligence, causation and comparative negligence.

Factually, at the close of complainant's case, the Court conceded:

> There [were] ample facts from which the Court might determine that there was negligence on the part of the vessel in this case, negligence on part of the Captain . . .

Following this observation, the defendant put on its case. The only defense witness who challenged the complainant's case was rejected by the Court inasmuch as the court specifically found that the non-skid in question was worn, directly contradicting the defense witness' testimony. Accordingly, from the point where the Judge conceded that there was "ample evidence" in favor of the complainant, *nothing* occurred which could have altered that correct observation and conclusion.

As wards of the court, seamen are provided special solicitude. One of the benefits to flow from this paternalistic relationship is a reduced burden of proof with regard to negligence and causation. The Fifth Circuit has repeatedly characterized this burden as "featherweight," requiring only "evidence of the 'slightest' negligence [as] sufficient to sustain a finding of Jones Act liability."

The exact same standard has been applied with regard to proving proximate cause. If the slight negligence mentioned above plays any role, "no matter how slight," in causing complainant's injuries, the seaman prevails. Further, the courts have acknowledged that, given the realities of maritime employment, a seaman's duty to protect himself is not ordinary care, but slight care.

The Court below misapplied the standards with regard to negligence, proximate cause, and comparative negligence. Further, the trial court manifestly erred in finding Ardoin at fault given the complete dearth of testimony put on by the party whose burden it is to prove comparative fault, Seacor.

Finally, the trial court abused its "much discretion" in ruling that the defendant had successfully rebutted complainant's case. Again, at the close of Ardoin's case, the Court conceded:

> "There are ample facts from which the Court might determine that there was negligence on the part of the vessel in this case, negligence on part of the Captain that would remedy the failure to remedy the condition of the steps;"

Yet, the trial court ruled against complainant despite the paucity of credible evidence put on in rebuttal of Ardoin's case in chief. The only testimony offered to rebut that of Ardoin (and two supporting fact witnesses), was that of the vessel's Captain which was obviously rejected by the Court when it ruled that the non-skid tape was indeed worn.

ARGUMENT

JONES ACT NEGLIGENCE STANDARDS

The Trial Court in this matter erred in applying the wrong legal standard concerning the appropriate Jones Act burden of proof. The relaxed burden of proof enjoyed by seamen requires only that they demonstrate "slightest negligence" in order to prevail. In its memorandum opinion, the trial court in this matter misstated the burden when it announced that the " . . . plaintiff must prove not only that there was ***negligence*** on the part of his employer . . . "[8]

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[8] See memorandum opinion at page 5.

Well known to this Honorable Court is the axiom that seaman are considered wards of the Court and are to be provided special solicitude.[9] The justification for this status was eloquently explained in *James H. Shrigley*, **supra**:

> "They are regarded as the wards of the Courts and every shield and safeguard which the law can give is thrown around them both by legislative enactment and judicial decision. Their usefulness and importance on the one hand and their proverbial improvidence and recklessness on the other have made them the objects of solicitude in all commercial nations. It is the aim of the law to shield them from oppression and take care of their rights and interests by protecting them, not only against the master, but also against themselves."

The essence of the *Shrigley* opinion manifests itself one hundred years later in the continued adherence to relaxed standards of negligence and causation along with the recognition that the realities of maritime employment frequently place a seaman in a position where he exercises little control over his work environment. The reduced burden of proof provided for seamen, with regard to both negligence and causation, is illustrated in a long line of cases.[10] In *Johnson*, the Court stated that

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[9] *James H. Shrigley*, 50 F. 287, 287-288 (N.D.N.Y. 1892).

[10] *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988), Cert. denied, 488 U.S. 968 (1988); *Smith v. Trans-World Drilling Company*, 772 F.2d 157, 162 (5th Cir. 1985); *Davis v. Hill Engineering*, 549 F.2d 314 (5th Cir. 1977).

"evidence of the 'slightest' negligence is sufficient to sustain a finding of Jones Act liability."[11] **Supra at 1352.**

The relaxed burden also applies to proving legal causation.[12] ***Davis*** and ***Landry***, as well as a host of other cases, have characterized the complainant's burden of proof on the issue of proximate cause in actions based on the general maritime law and the Jones Act as "very light, even 'featherweight.'" Traditional notions of "proximate cause" are not applicable to Jones Act claims; a defendant must bear responsibility for its slight negligence, if such slight negligence "played any part, even the slightest, in producing the injury."[13]

Given the almost complete control that a maritime employer has over the injury-producing circumstances or instrumentality, it is critical that the relaxed burden of proof with regard to *both* negligence and causation be rigorously applied in all Jones Act cases. Given the corresponding lack of control imposed upon a seaman, it would be virtually impossible for a Jones Act claimant to prove all of the traditional elements of negligence and causation without the relaxed standards.

The trial court failed to apply the appropriate standard with regard to negligence. In its memorandum opinion, the trial court stated " . . . plaintiff must prove that

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[11] See also *Theriot v. J. Ray McDermott and Co., Inc.*, 742 F.2d 877, 881 (5th Cir. 1984).

[12] *Davis*, supra; *Landry v. Oceanic Contractors, Inc.*, 731 F.2d 299, 302 (5th Cir. 1984).

[13] *Landry*, supra at 302. See also *Chisholm v. Sabine Towing and Transportation Company*, 672 F.2d 60 (5th Cir. 1982).

there was *negligence* on the part of his employer . . . "[14] Implicit in this statement is the misapplication of a heavier, more onerous standard than is required under the Jones Act and general maritime law. When dealing with a seaman's burden of proof in a Jones Act claim, the word "negligence" cannot stand by itself. Rather, it must be preceded by the word "slightest."[15]

In its memorandum opinion, the Court conceded that the non-skid tape "had been in use for some time and was worn . . . "[16] Both Ardoin and two independent witnesses testified that the non-skid tape was in fact in very poor condition. One of those witnesses, Mike Sampson, was still employed by the defendant at the time of the trial. Given his relationship with the defendant, his testimony should be accorded great weight. His testimony corroborated Ardoin's concerning both the condition of the tape and the fact that the crew was in the middle of replacing the non-skid tape:

> [a]t the time, it wasn't no good . . . it was torn. We was changing them out like that. They be worn out. [sic].[17]

The second witness, Patricia Steinauer, testified that " . . . the tape – you know, it should have – it was getting

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[14] See memorandum opinion at page 5.

[15] *Johnson*, supra; *Comeaux v. T. L. James and Co., Inc.*, 702 F.2d 1023 (5th Cir. 1983); *Davis*, supra.

[16] See memorandum opinion at page 4.

[17] See excerpt from Sampson's testimony, page 102, lines 6-9, Record excerpt No. 5.

ready to need to be replaced."[18] The statement she gave to Ardoin's attorney was unequivocal with regard to the condition of the non-skid tape. Steinauer's quarters were on the lower deck so she had little reason to use the stairs. However, she had a specific memory that the bottom two steps, which she could see all day long from her position in the galley, were in need of repair. The trial court was clearly mistaken in totally disregarding Steinauer's testimony.

The only testimony the defendant put on in rebuttal of Ardoin, Steinauer and Sampson was that of Captain Gery Williams. Williams' testimony is colored by his many years of employment with Seacor. Williams admitted on the witness stand that he failed to make any notation on the accident report concerning his investigation of the stairs in question.[19]

Williams also testified that one of his duties as Captain of the vessel would be to investigate an accident with an eye toward determining the cause. His failure to note the condition of the steps on the accident report casts doubt upon his "independent" recollection, more than two years after the incident, that the steps were in good condition. Further, Williams amazingly recalled the exact inventory of non-skid tape aboard the vessel, though he was unable to remember the inventory of any of three

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[18] See excerpt from Steinauer's testimony, p. 120, lines 20-22, Record excerpt No. 6.

[19] See excerpt from Williams' testimony, page 131, lines 2-7, Record excerpt No. 7.

other items he testified were stored aboard the M/V SEA ISLAND.[20]

In attacking Ardoin's failure to chronicle the exact details of his accident and the cause thereof, the Court imposes a higher duty upon him than it does upon the vessel's captain. It is both unfair and illogical to criticize Ardoin for failing to detail the cause of the accident when neither the report form nor the Captain made that inquiry. Despite the obvious inequity of requiring Ardoin to spring up off the floor and detail the events and cause of the accident while imposing no such requirement upon Captain Williams, the Court chose to ignore Williams' testimony (which was to the effect that the non-skid tape was in "good condition"), by finding that the non-skid tape was indeed in a worn condition.[21]

With the Court having rejected Williams' testimony, the most credible, independent testimony is that of Sampson, who clearly stated that the tape was worn and needed replacing. It is clear from the testimony available in this case that appellant has established the requisite "slightest negligence." In requiring the complainant to prove more than the Jones Act "slightest negligence," the trial court overlooked the correct standard established

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[20] See excerpt from Williams' testimony, page 128, lines 2-25, Record excerpt No. 8.

[21] See excerpt from Williams' testimony, page 110, lines 20-21, Record excerpt No. 9.

through the historical development of Jones Act jurisprudence as well as that of its progenitor, the Federal Employers' Litigation Act ("FELA").[22]

A SEAMAN'S COMPARATIVE NEGLIGENCE

The Trial Court also erred in applying the wrong law with regard to a seaman's duty to look out for his own safety. Twice in its memorandum opinion the Court below declared that Ardoin's accident would not have occurred had he exercised *ordinary* care. This Honorable Court has consistently ruled that, in light of the realities of maritime employment, the dangers associated therewith, and the "proverbial improvidence and recklessness" of sailors, that a seaman's duty to protect himself is not ordinary care, but "slight care."[23]

In the trial court's memorandum opinion, comparative fault was assigned wholly to Ardoin ostensibly due to his "failure to *observe ordinary* care for his own safety"[24] (Emphasis added). Not only is this factually inaccurate and without any supporting evidence, but it is also a glaring misapplication of the law. "Ordinary care" is not the applicable standard. The Court again stumbled into the same error when it stated that:

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[22] See *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ld.2d 916 (1946); and *Ferguson v. Moore-McCormick Lines, Inc.*, 352 U.S. 521, 77 S.Ct 457, 1 L.Ed.2d 511 (1957).

[23] *Johnson*, supra at 1355; *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980).

[24] See memorandum opinion page 5.

> [T]he non-skid tape on the stairs where plaintiff fell, while it had been in use for some time and was worn, was not frayed and torn in such a manner as to cause a person exercising ***ordinary care*** for his own safety to stumble or slip and fall down the stairs (Emphasis added).[25]

Surely, it cannot be harmless error when a trial court twice misapplies the standard which is a cornerstone of the Jones Act.

In addition to failing to apply the correct standard concerning Ardoin's comparative fault, the trial court evidently ignored the fact that comparative fault is an affirmative defense, and the burden of proof lies with the defendant, Seacor. Seacor put on absolutely no evidence to establish whether or not Ardoin was using the handrail at the time of his accident. The only evidence whatsoever concerning the use of the handrail was Ardoin's own candid testimony that he did not have a specific recollection of using the handrail at that moment, but it was his habit and custom to do so. Thus, the evidence adduced at trial establishes that it was more likely than not that Ardoin *did* use the handrail. Even if Ardoin's own testimony is ignored, that leaves the Court no evidence with which to rule either way on the question of comparative fault.

Seacor utterly failed to carry its burden with respect to comparative fault. As such, it was manifestly erroneous for the trial court to conclude that Ardoin, who testified that his normal habit was to use the handrail, failed to exercise even "the slightest care" for his own

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[25] See memorandum opinion at page 4.

safety. Not a scintilla of evidence is to be found in the record that Ardoin should be assigned any fault in this case. Thus, placing the negligence "solely at the door of the complainant himself" would be a gross injustice.[26]

ARDOIN'S "AMPLE" EVIDENCE OF NEGLIGENCE AND UNSEAWORTHINESS

Finally, the trial court erred in ruling that Seacor had successfully rebutted plaintiff's case in chief. The law of appellate review is clear that a trial court may be reversed when there is a lack of "substantial evidence" supporting the trial court's decision.[27]

At the conclusion of Ardoin's case in chief, and in response to a Motion for Judgment as a Matter of Law by Seacor, the court stated the following with regard to the evidence complainant had put on:

> "There are ample facts from which the Court might determine that there was negligence on the part of the vessel in this case, negligence on part of the Captain that would remedy the failure to remedy the condition of the steps;"

At that point in the trial, the testimony available to the trial court, to include that of two independent, neutral witnesses, was that the non-skid tape on the stairs was in poor condition, and that the old tape was the cause of Ardoin's mishap. During the defendant's case in chief, the only evidence put on concerning the condition of the

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[26] See memorandum opinion at page 5.

[27] See *Gibraltar Savings v. L.D.Brinkman Corp.*, 860 F.2d 1275 (5th Cir. 1988).

non-skid tape was that of Captain Williams. Williams testified that the tape was in "good condition," but was not competent to testify at all concerning the facts of the accident.[28]

The Court correctly rejected the testimony of Captain Williams. In its memorandum opinion, the Court held "that the non-skid tape on the stairs where complainant fell . . . had been in use for some time and was worn . . . " However, the trial court then went on to rule, with no supporting evidence, that the worn condition of the tape played no role in Ardoin's accident. Having disregarded the Captain's testimony concerning the condition of the tape, there is no evidence other than the testimony of Ardoin, Sampson and Steinauer, all in agreement that the non-skid tape was in poor condition.

In a Jones Act/general maritime law case, complainant must only prove that the defendant's negligence "play[ed] any part, no matter how slight, in producing complainant's injuries."[29] In upholding the jury instruction in *Litherland*, the Court stated that "appellant's burden of persuasion on causation is very light."[30] It is inconceivable that the trial court, in the face of the unbiased and credible testimony of Sampson and Steinauer, could fail to find the slightest causal connection between

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[28] See excerpt from testimony of Williams, p. 110, line 20-21, Record excerpt No. 9.

[29] *Litherland v. Petrolane Offshore Const. Services*, 546 F.2d 129 (5th Cir. 1977), (quoting an upheld jury instruction), at page 132; *Theriot*, supra.

[30] *Litherland*, supra at 134.

the worn non-skid tape and Ardoin's accident. The Court's finding on this matter is simply not supported.

Given the inconsistency between the evidence adduced at trial and the trial court's findings, the appellate court may look to the whole record in order to gain a full understanding of the factual basis of the trial court's decision.[31] Further, the questions of Seacor's negligence and the unseaworthiness of the M/V SEA ISLAND, as well as the finding of comparative fault on the part of Ardoin, are mixed questions of law and fact. As such, de novo review is available to the appellate court concerning the trial court's pronouncements on those questions.[32]

CONCLUSION

The Court below applied the wrong law to this Jones Act case. For Ardoin, a twenty-four year old seaman with a wife and young child, this was no "harmless error", it was a devastating error.

It is not without reason that the term "slight negligence" appears throughout the jurisprudence in this field. Working on board an offshore vessel is a dangerous, high-risk endeavor.

As an easily replaced cog in the vessel's crew, the seaman exercises virtually no control over his work environment. This is simple economic reality. Therefore, the standard of care to which he is held for his own safety is relaxed.

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[31] *Ferguson v. Hill*, 846 F.2d 20 (5th Cir. 1988).

[32] *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985).

Jody Ardoin spent three years of his young life working his way up in this company. Only six weeks before this accident, he had been promoted to mate. He is a credible, hard-working young man who is now disabled for the rest of his life. If Jody Ardoin could call witnesses in this appeal, certainly Judge Putnam would be on the "will call" list. When Ardoin's case in chief was finished, the Court correctly announced there was "ample" evidence of negligence and unseaworthiness.

What happened during the defendant's presentation that changed the Court's mind? Only one witness (an obviously biased company Captain) offered any testimony to rebut Ardoin's case. Yet, his testimony concerning the crucial issue of the condition of the stairs was rejected by the Court. There simply was no other evidence bearing on the issue of liability and the condition of the stairs on the day of the accident. The only conceivable reason that the trial court ruled the way it did was the misapplication of the correct Jones Act standard regarding negligence, causation and comparative fault.

Appellant respectfully urges this Honorable Court to exercise its power to reconsider the ruling below made without any substantial evidence in support thereof, and review de novo the findings of liability and quantum.[33]

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[33] Please see plaintiff/appellant's post-trial brief on quantum in record excerpt.

TRIAL: NOVEMBER 9, 1992

HOW THE EVIDENCE DEVELOPED

ARDOIN'S CASE

JODY ARDOIN

- Non-skid badly worn.
- Whole foot did not fit on stairs.
- Habit of using handrail.
- While replacing the non-skid, ran out of tape.

PATRICIA STEINAUER; employed by Seacor at the time of accident.

" . . . The bottom two steps were starting to get . . . It was getting ready to need to be replaced. It was starting a little bit to get worn there where you put your first foot."

MIKE SAMPSON; Current employee of Seacor Marine

"At the time, it wasn't no good . . . It was torn. We was changing them out like that. They be worn out."

JUDGE PUTNAM:

"There are ample facts from which the Court might determine that there was negligence on the part of the vessel in this case, negligence on part of the Captain that would remedy the failure to remedy the condition of the steps; and I want to consider the testimony without making a ruling on it."

ARTHUR SARGENT	GERY WILLIAMS
Seacor's Liability Expert "I think I would do things things a little bit differently."	The trial court chose to ignore Williams' testimony that the non-skid tape was in "good condition."

Respectfully submitted,

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GALEN W. McBRIDE (#20944)

CERTIFICATE

I hereby certify that a copy of the above and foregoing brief has been served upon all counsel of record for all parties by placing same in the United States Mail, postage prepaid and properly addressed this ___ day of _____, 1993.

_____

RICHARD J. ARSENAULT

(2)

Supreme Court, U.S.
FILED
FEB 1 1994
OFFICE OF THE CLERK

NO. 93-1155

In the Supreme Court of the United States

OCTOBER TERM, 1993

JODY WAYNE ARDOIN
Petitioner

versus

SEACOR MARINE, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In this Jones Act and unseaworthiness case, did the United States Court of Appeals for the Fifth Circuit act correctly in affirming the trial judge's factual determination that the complainant failed to meet his burden of proof where the trial judge disbelieved the complainant's version of events and found as a matter of fact that the alleged accident was caused not by any negligence or unseaworthiness attributable to the defendant, but by the complainant's failure to hold the handrails while he attempted to carry his duffel bag down the vessel stairway on which he fell?

LIST OF INTERESTED PERSONS

Mark J. Spansel and Edwin C. Laizer of the law firm of Adams and Reese, counsel for respondent Seacor Marine, Inc., certify that the following listed parties have an interest in the outcome of this case. This representation is made pursuant to Rule 24.1(b) of the Rules of the Supreme Court of the United States:

1. Jody Wayne Ardoin - Complainant/Petitioner

2. Mr. Richard J. Arsenault
   Mr. Galen W. McBride
   NEBLETT, BEARD & ARSENAULT
   P. O. Box 1190
   Alexandria, Louisiana 71309-1190
   Attorneys for Complainant/Petitioner

3. Seacor Marine, Inc.[1] Defendant/Respondent

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Seacor Marine, Inc. provides the following list of its parent companies and subsidiaries:

Acadian Offshore Services, Inc.	Seacor Ocean Boats, Inc.
Acadian Supply Ships, Inc.	Seacor Ocean Lines
Anna Offshore, Inc.	Seacor Ocean Support Services, Inc.

LIST OF INTERESTED PERSONS (continued)

4. Mark J. Spansel
Edwin C. Laizer
ADAMS AND REESE
4500 One Shell Square
New Orleans, Louisiana 70139
Attorneys for Defendant/Respondent

(footnote 1 continued)

Arthur Levy Enterprises
Gem Shipping, Inc.
Gem Shipping, Ltd.
Seacor Holdings, Inc.
Seacor Marine (Gabon), Inc.
Seacor Marine International, Inc.
Seacor Marine (Nigeria), Inc.
Seacor Offshore, Inc.
Seacor Supply Ships Association, Ind.
Storm Shipping, Inc.
Vector-Seacor Ltd.
Veesea Holdings, Inc.,
West Africa Offshore, Ltd.

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45 U.S.C.A. § 51 . . . . . 2,A-3

46 U.S.C.A. § 688 . . . . . 2,3,A-2

NO. 93-1155

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JODY WAYNE ARDOIN

Petitioner

versus

SEACOR MARINE, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Following a bench trial of this Jones Act and unseaworthiness case, the district court found as a matter of fact that petitioner Jody Wayne Ardoin ("Ardoin") had failed to meet his burden of proof, as a result of which judgment was entered in favor of respondent, Seacor Marine, Inc. ("Seacor"). That conclusion was summarily affirmed by the United States Court of Appeals for the Fifth Circuit. Despite the fact that the case turned on issues of fact and credibility, Ardoin now asks this Honorable Court to exercise its jurisdiction to review the case. Seacor respect-

fully submits that Ardoin's Petition for Writ of Certiorari should be denied for the reasons set forth below.

OPINIONS BELOW

The United States District Court for the Western District of Louisiana, docket number CV91-0290-L, rendered its "Memorandum Opinion" rejecting complaint's claims on December 8, 1992. Judgment was entered in favor of Seacor on December 9, 1992. (Petitioner's App. at A-6 through A-12 and A-13, respectfully).

The United States Court of Appeals for the Fifth Circuit summarily affirmed the trial court in an unpublished decision bearing docket number 92-5281 and entered into the record on October 1, 1993. (Petitioner's App. at A-1 through A-5).

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 52(a) - Reproduced in Appendix.

2. The Jones Act, 46 U.S.C.A. § 688(a) - Reproduced in Appendix.

3. The Federal Employers' Liability Act, 45 U.S.C.A § 51 - Reproduced in Appendix.

STATEMENT OF THE CASE

In this Jones Act and unseaworthiness case, petitioner Ardoin claimed to have fallen down an interior stair-

way on the M/V SEA ISLAND, a vessel owned, maintained and operated by respondent Seacor. At the time of the alleged accident, Ardoin was the mate aboard the M/V SEA ISLAND, on which he had been assigned for one week. He was an experienced seaman, having worked for Seacor for slightly over three years in a variety of positions aboard numerous vessels.

At approximately 5:30 a.m. on the morning of October 11, 1990, the M/V SEA ISLAND was moored at a dock in Cameron, Louisiana. Ardoin, who was going ashore as part of a normal crew change, fell while attempting to descend the stairway running from the forecastle deck to the main deck of the M/V SEA ISLAND. The accident was unwitnessed and occurred as Ardoin started down the stairs carrying his sea bag, which was approximately 3' long, weighed roughly 15 lbs., and contained his personal clothes and gear.

On February 11, 1991, Ardoin filed suit against Seacor in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, alleging claims under the Jones Act, 46 U.S.C. § 688, and under the general maritime law theory of unseaworthiness. Ardoin waived his right to a jury and in November, 1992, the case was tried to District Judge Richard J. Putnam, who has over thirty-one years experience on the federal bench. After hearing all of the evidence and having the opportunity to assess the demeanor and credibility of the witnesses, Judge Putam disbelieved Ardon's version of events and concluded that the accident was caused by Ardoin's failure to use the available handrails, rather than by any

negligence or unseaworthiness on the part of Seacor.

Although Ardoin initially attempted to suggest in his trial testimony that he was holding the handrails at the time he fell, he finally admitted, after rigorous cross-examination, that he could not remember whether he was using the handrails. However, Ardoin did not admit this crucial point without first attempting to avoid it, and even then, admitted it only in response to questioning by the trial judge:

> Q: All right. Do you remember whether you were using the handrail?
>
> A: I would think so. I have a good habit of using them.
>
> Q: But you really don't recall whether you were or not? You don't specifically recall whether you were using the handrail, do you?
>
> A: I would think so.
>
> Q: You think so but you don't recall?
>
> THE COURT:
>
> Q: Do you remember; were you using the handrail or not? If you don't know, say you don't remember or whatever. If you do remember, say so. We don't want to know what you think.

THE WITNESS:

A: I don't remember.

(Record, Vol. IV, pg. 58, ln. 19 through pg. 79, ln. 7.)

Within fifteen minutes after the accident, Ardoin completed two accident reports in his own handwriting, one for Seacor and one for the dock owner, Conoco. In the Seacor accident report, Ardoin wrote "I was coming down the stairs an [sic] to the galley and fall [sic]. I was carrying my bag of clothes." In the Conoco accident report, Ardoin wrote "I was coming down the stairs to the galley and fell. I had a bag in my hand." In neither report did Ardoin mention anything about any condition of the vessel playing any part in his accident.

Throughout this litigation, Ardoin attempted to gloss over the obvious fact that his accident was caused by his failure to hold the handrail by claiming that his accident was caused by some condition of the stairway. In so doing, Ardoin took what could best be described as a "shotgun" approach, throwing out a number of mercurial theories and hoping to convince the lower courts that Seacor was at fault.

Ardoin's original complaint specifically alleged only that the lighting was insufficient. In the pre-trial stipulations filed in the trial court, Ardoin modified his claim to allege that the accident occurred because at the time of the accident: (1) there were *no lights* on inside the vessel; (2) the non-skid material on the stairs was worn and in poor condition; and, (3) there was an accumulation of foreign

substances present on the stairs. At trial, Ardoin's contentions shifted again, as he added for the first time the claim that the stairs were not deep enough and were too steep.

As is recognized in Section III of the Fifth Circuit's summary opinion in this case (Petitioner's App. at A3-4), Ardoin failed to prove that any of these alleged conditions contributed to his fall. Consequently, both of the lower courts concluded as a matter of fact that Ardoin had failed to meet his burden of proving negligence and legal causation. To illustrate the correctness of the lower courts' decisions, Seacor will briefly outline the evidence which was presented at trial regarding each of the conditions which Ardoin sought to blame for his accident.

1. Condition of the Non-Skid Tape

In his Petition for Writ of Certiorari at page 3, Ardoin now claims that his fall was caused "... primarily by the worn and frayed condition of the non-skid tape covering a portion of each tread on the stairwell." At trial, Ardoin described the non-skip tape as "worn, torn, peeling, smooth and slick, frayed," a phrase which he disingenuously denied having memorized in preparation for his testimony. The lower courts contrasted the articulateness of this description with Ardoin's inability to recall how many handrails were present in the stairwell and with his narration of the accident in the two aforementioned handwritten accident reports which he completed within minutes of his fall. In neither of those accident reports did Ardoin mention anything about any alleged insufficiency or involvement of the non-skid tape. Indeed, as noted above, the allegation of inadequate non-skid tape did not even appear in Ardoin's original complaint, which was filed four months after the accident.

Contrary to the suggestion contained in Ardoin's Petition for Writ of Certiorari, Ardoin's claim was absolutely not supported by the testimony of deckhand Michael Sampson. While Sampson did testify on direct examination that the tape was worn, Ardoin fails to appraise this Court of the fact that on cross-examination, Sampson directly contradicted himself by stating that the tape was still "pretty good." Sampson also contradicted Ardoin's testimony that the vessel had run out of non-skid tape so that the crew could not finish replacing the tape, a routine maintenance task which Ardoin had started but failed to complete in the days before his fall. When examined on this topic, Sampson testified that the tape was never used on outside steps (as Ardoin claimed) and that he did not recall running out of tape. Again, this important fact is omitted from Ardoin's Petition for Writ of Certiorari.

Ardoin's papers also attempt to suggest that his version of events was supported by the ship's cook. Patricia Steinauer. While Ardoin represents to this Honorable Court that Steinauer testified that the non-skid tape was wearing out, he fails to point out that the trial court flatly rejected Ms. Steinauer's hopelessly confused and contradictory testimony, calling it "valueless." As the trial court correctly noted, Ms. Steinauer testified at trial that she never used the steps in question. She also repudiated as "mistakes" two earlier recorded statements in which she had indicated that she was sitting in the galley at the time of the accident. At trial, she testified that she was actually in her room asleep at the time.

Seacor presented the clear, credible and convincing testimony of Gary Williams, the captain of the M/V SEA

ISLAND. He deflated Ardoin's claim that the vessel had run out of non-skid tape by explaining that he had not ordered Ardoin to use the tape outside, because non-skid is used only on inside stairways. Captain Williams also testified that there were at least two rolls of non-skid tape in stock on the vessel at the time of the accident, which he remembered because he had obtained the tape from Seacor's safety representative several weeks earlier. With respect to the condition of the tape on the day of the accident, Captain Williams testified that after he learned of the alleged accident, he inspected the steps and found that although it had been in use for some time, the tape was still in good condition and still had good traction qualities.

Seacor also offered the testimony of Arthur Sargeant, who was accepted by the trial court as an expert in naval architecture and marine engineering. Mr. Sargeant explained that even without the non-skid tape, the checkered plate, raised diamond patterned surface of the steps made them safe and slip-resistant. Mr. Sargeant characterized the tape as an "extra precaution" and explained that even tape in a condition like that described by Ardoin would not have presented either a tripping or slipping hazard.

2. Insufficient Lighting

Although his pre-trial pleadings suggested that there were no lights on inside the vessel, Ardoin admitted at trial that in actuality, there were lights on at the top and bottom landings of the stairway, in the bathrooms at the top and bottom of the stairway, and in the engineer's room,

which was directly across from the top of the stairway. Several witnesses, including Sampson, Williams and Sargeant, testified that the lighting was adequate and sufficient. Sargeant's testimony established that the lighting not only met Coast Guard standards, but also met good naval architecture and marine engineering standards.

3. Foreign Substances on Stairs

Although this claim was included in his pre-trial pleadings, Ardoin was forced to abandon it at trial. On direct examination by his own counsel, this claim was not discussed. When confronted on cross-examination with his claim in the pre-trial stipulations that foriegn substances had been involved in the accident, Ardoin initially attempted to claim that there "could have been" a foreign substance present. However, when pushed, Ardoin eventually withdrew this contention and admitted that he was no longer claiming that a foreign substance was involved. Not surprisingly, Sampson and Williams, the other witnesses who testified as to the condition of the steps on the day of the accident, both confirmed that the steps were clean and free of foreign substances.

4. Depth and Steepness of Steps

The issue as to whether the steps were too steep or too narrow was raised for the first time at trial. Again, this allegation was contradicted by the testimony of the witnesses, particularly including Mr. Sargeant, who explained that the stairway was similar in design and construction to those on most offshore supply vessels. As Mr. Sargeant explained, the M/V SEA ISLAND is a Coast

Guard inspected vessel and the stairway in question met both Coast Guard and A.B.S. requirements.

The Trial Court's Conclusion

Having heard all of the testimony and viewed the numerous exhibits which were offered into evidence, the trial judge concluded that Ardoin failed to carry his burden of proving negligence or unseaworthiness. In so doing, the trial judge made credibility determinations and came to the conclusion that Ardoin's version of events was not believable, specifically finding as a matter of fact that Ardoin did not hold the handrails as he proceeded down the steps and that it was the failure to use the handrails which caused the accident. The trial court also found that none of the alleged conditions cited by Ardoin contributed to the accident. These factual findings were summarily affirmed by the United States Court of Appeals for the Fifth Circuit.[2]

ARGUMENT

I. No Special and Important Reasons Exist to Grant Certiorari

This was a fact-specific case in which the able and experienced trial judge carefully considered the evidence and

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[2] Ardoin actually appealed only the Jones Act negligence issue to the Fifth Circuit. Likewise, in his petition for writ of certiorari in this Court, Ardoin does not brief the lower courts' rejection of his unseaworthiness claim; accordingly, the unseaworthiness claim is not before this Court. See Rule 14.1 of the Rules of the Supreme Court of the United States.

testimony, drew conclusions regarding the demeanor and credibility of the witnesses, and made factual findings which were fully supported by the record. Although he attempts to couch the issue presented to this Honorable Court as a question of law, Ardoin's Petition for Writ of Certiorari effectively asks this Court to review the trial judge's factual conclusion that Ardoin failed to prove his claims against Seacor, which is the same argument that was summarily rejected by the Fifth Circuit. Ardoin's Petition for Writ of Certiorari presents none of the "special and important reasons" which would be required to justify review by this Court.

It is axiomatic that review on writ of certiorari is not a matter of right, but of judicial discretion. For many years, in determining whether writs of certiorari should be granted, this Court has applied the principle:

> ... that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422, 423 (1923). For this reason, Rule 10.1 of the Rules of the Supreme Court of the United States makes clear that review on writ of certiorari will be granted only when there are "special and important reasons therefore." The rule sets forth the following examples of the "character of reasons" that will

justify review:

(a) When a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

For obvious reasons, this list does include what Ardoin seeks; i.e., review of the factual findings of lower federal courts.

Reference to petitioner's papers will show the absence of any statement regarding the existence of any alleged "special and important reasons" for review. This, of course, is because no such reasons exist in this case, which turned on questions of fact and credibility. For this reason alone, petitioner's writ application should be denied.

II. The Factual Findings of the Trial Court Were Correct and Were Properly Affirmed Under the Clearly Erroneous Standard

As discussed above in the "Statement of the Case" portion of this brief, although he modified his claims several times during the course of the litigation, Ardoin went into the trial alleging that his fall was caused by worn non-skid tape on the steps, inadequate lighting, the narrowness and steepness of the steps, and the presence of foreign substances on the steps. Under cross-examination, Ardoin abandoned the foreign substance claim. The remaining claims were carefully considered and rejected by the trial court after hearing all of the evidence.

The trial court's "Memorandum Opinion" carefully dissected each of Ardoin's remaining claims. (See Petitioner's App. at A-6 through A-12). Noting the inconsistencies in Ardoin's testimony and the contradictions in the testimony of his witnesses, the trial judge accepted the testimony of Seacor's witnesses and found: (1) that although the non-skid tape had been in use for some time and was worn, it was not frayed, torn or dangerous as plaintiff cliamed; (2) that the lighting was proper and adequate; and (3) that the depth and steepness of the stairway was normal and appropriate.

Most importantly, the trial court also found that Ardoin was not holding the easily accessible handrails as he descended the stairs and that this caused the accident. Remarkably, Ardoin's Petition for Writ of Certiorari never mentions this crucial factual finding.

It is clear that questions of negligence and causation

in admiralty cases are treated as factual findings and are reviewed under the clearly erroneous standard. *See* F.R.C.P. 52(a) and *Gavagan v. U.S.*, 955 F.2d 1016, 1019 (5th Cir. 1992), quoting *Noritake Co., Inc. v. M/V HELLENIC CHAMPION*, 627 F.2d 724, 727-28 (5th Cir. 1980). Under this standard, a factual finding is clearly erroneous only "when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Anderson, supra*, 470 U.S. at 573-74, 105 S.Ct. at 1511.

Rule 52(a) of the Federal Rules of Civil Procedure specifically requires that due regard be given to the opportunity of the trial court to judge the credibility of the witnesses. Credibility choices and the resolution of conflicting testimony are matters within the province of the trial court sitting without a jury, subject only to the clearly erroneous rule. *Gifford v. National Gypsum Co.*, 753 F.2d 1345 (5th Cir. 1985).

The trial court in this case was confronted with incredible and inconsistent testimony from Ardoin regarding his unwitnessed accident and was further confronted with inconsistent and conflicting evidence from the witnesses Ardoin called to support his case. Seacor's witnesses, on the other hand, were consistent, credible and impressive. As was his duty, the trial judge utilized his extensive experience to weigh the evidence and the conflicting

testimony and made the factual finding that there was no negligence or unseaworthiness on Seacor's part and that the accident was caused by Ardoin's failure to hold the handrail. The United States Court of Appeals for the Fifth Circuit had no difficulty in summarily affirming these findings.

Seacor submits that the factual findings at issue are precisely the kinds of findings which must upheld under the clearly erroneous standard. The lower courts acted correctly in rejecting Ardoin's claims, and Ardoin's Petition for Writ of Certiorari should be denied.[3]

III. Both the Trial Court and the Fifth Circuit Applied the Proper Law

Recognizing the futility of attacking the trial court's factual findings, Ardoin argues that the trial court applied an improper legal standard in deciding this case. In particular, Ardoin argues that the trial court evaluated his conduct under a standard of "ordinary care." Citing

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[3] Ardoin seems to suggest in his Petition for Writ of Certiorari at page 6 that the trial court's denial of Seacor's motion for judgment as a matter of law at the close of Ardoin's case somehow establishes the correctness of his position. In the first place, Ardin's account of the trial Judge's comments in denying the motion is misleading; taken in their entirety, the comments clearly show that the judge was not ruling on liability, but was simply exercising his right to hear the defendant's case. Moreover, it is obvious that the denial of a motion for judgment as a matter of law at the conclusion of the plaintiff's case cannot be construed as a ruling in favor of the plaintiff on the merits, because if it could, then virtually every case would end at the conclusion of the plaintiff's case, depriving the defendant of the right to to put on evidence. *See Armour Research Found. of Ill. I. of T. v. Chicago, R.I. & P.R. Co.*, 311 F.2d 493 (7th Cir. 1963), *cert. denied* 372 U.S. 966, 10 L.Ed.2d 129, 83 S.Ct. 1091 (1964) and *Integrated Circuits Unlimited v. E.F. Johnson Co.*,

several Fifth Circuit cases, Ardoin asserts that a Jones Act seaman's conduct should be evaluated under a standard requiring the seaman to exercise only a slight duty to protect himself.[4]

Ardoin's argument is fatally flawed from the outset because while he claims that an improper legal standard was applied to his conduct (i.e., comparative negligence), the reality is that the comparative negligence issue was never reached, because, as the Fifth Circuit noted in its opinion, the trial court determined that Ardoin failed to carry his burden of proving negligence or causation, slight or otherwise, on the part of Seacor. Without proof of these threshold issues, there could be no liability regardless of the standard used to judge Ardoin's actions.

In any event, the trial court correctly applied the law as enunciated by this Court. In *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 1 L.Ed.2d 511, 77 S.Ct. 457 (1957), this Court recognized that the appropriate standard of care for a Jones Act employer is that set forth in *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 524, 559, 1 L.Ed.2d 493, 515, 77 S.Ct. 443, 459, 478, *reh. den.*, 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957), a F.E.L.A.

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[3] 875 F.2d 1040 (2d Cir. 1989), both of which rejected similar arguments.

[4] As he did in the Fifth Circuit, Ardoin takes issue in this Court only with the trial court's handling of the Jones Act claim. He has not argued or briefed the unseaworthiness issue, which is therefore waived. See footnote 3 above.

case:

> It involves the same general concept on which is based every 'negligence case' in the state courts and in the multitudinous cases in the federal courts on diversity of citizenship in which the question is merely one of common-law negligence; that is, it is the familiar type of litigation that is part of the day-to-day business of state and federal trial judges.

Rogers, supra, 352 U.S. at 538, 1 L.Ed.2d at 527.

With regard to causation, this Court said in *Rogers, supra*, 352 U.S. at 506, 1 L.Ed.2d at 499:

> Under [the FELA], the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

In discussing the burden of proof applied to this case, Judge Putnam quoted directly from this Court's decisions:

> So far as the claim under the Jones Act for negligence is concerned, Plaintiff must prove not only that there was negligence on the part of his employer, Seacor Marine, Inc., but that such negligence "played any part, even the slightest, in producing the injury ... for which damages are sought." *See Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 524, 559, 1 L.Ed.2d 493, 515, 77 S.Ct. 443, 459, 478, *reh.den.*, 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957); and *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 1

> L.Ed.2d 511, 77 S.Ct. 457 (1957), and their progeny. After carefully considering all of the evidence introduced by Plaintiff and that opposed to it, we cannot say that this burden has been carried. (*See* Petitioner's App. at A-10).

This excerpt of the trial court's opinion clearly shows that the trial court correctly applied the legal standard developed by this Honorable Court in *Ferguson* and *Rogers* and concluded that Ardoin had failed to carry his burden of proving negligence or causation against Seacor.[5]

Since comparative fault was never reached, the issue Ardoin attempts to raise is moot. However, even if comparative fault were properly at issue, evaluation of Ardoin's conduct under an "ordinary prudence" standard of care would have been appropriate under the law established by this Court. Indeed, in *Page v. St. Louis Southwestern Railway Company*, 349 F.2d 820 (5th Cir. 1965), the Fifth Circuit recognized that the standard of care should be one of "ordinary prudence" for both employee and employer:

> As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care and (2) causation, i.e., the relation of the negligence to the injury. **So far as negligence is concerned, that standard is the same - ordinary prudence - for both Employee and Railroad alike.** Unless a contrary result is imperative, it is at

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[5] The Fifth Circuit cases which Ardoin cites on page 5 of his Petition for Writ of Certiorari are all inapposite as they address the standard of care to be utilized in determining comparative negligence, an issue which was never reached in the instant case.

> best, unfortunate if two standards of causation are used. We think there are several reasons why substantively there is no such imperative. (Emphasis applied).

Id. at 823.

To the extent that some more recent Fifth Circuit cases suggest that a "slight negligence" standard is to be used in judging comparative fault, those cases mistakenly follow *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975), *clarified*, 546 F.2d 675 (5th Cir. 1977), in which the Fifth Circuit, citing *Ferguson*, erroneously departed from the *Rogers/Ferguson* "ordinary care" negligence standard by misapplying the term "slight" in describing both the employer's and the employee's standard of care. *Spinks*, 507 F.2d at 223. The use of the word "slight" in *Rogers*, 352 U.S. at 506, 1 L.Ed.2d at 499, related to causation and not to the standard of care. Through uncritical repetition in cases such as those cited on page 5 of Ardoin's Petition for Writ of Certiorari, the word "slight" has erroneously become associated with the standard of conduct in some Fifth Circuit cases. However, other Fifth Circuit cases, such as *Gavagan*, *supra*, 955 F.2d at 1019 n.7 (5th Cir. 1992), correctly follow *Ferguson and Rogers* and state the general negligence standard as one of "ordinary prudence."

While there is some conflict in the Fifth Circuit cases as to the proper standard of care to be used in determining comparative fault in Jones Act cases, the conflict need not be resolved in this case, because here, the trial court found no negligence (slight or otherwise) or causation against Seacor. Even in a Jones Act case, the plaintiff has the

burden of proving by a preponderance of the evidence that the defendant was negligent and that the defendant's negligence played any part, even in the slightest, in producing the injury. As the Fifth Circuit recognized in its review of this case, Ardoin failed to meet even this relaxed burden of proof.[6]

CONCLUSION

Respondent, Seacor Marine, Inc. respectfully submits that there are no "special and important reasons" why this case should be reviewed by this Court. The real issues involved here, which were correctly decided by the lower courts, involve the factual findings made by the trial judge. Those factual findings were fully supported by the record and were properly and summarily affirmed by the United States Court of Appeals for the Fifth Circuit under the clearly erroneous standard of review. Ardoin's request for review by this Court amounts to a request that this Court review the factual findings of the lower courts.

While the lower courts' rejection of Ardoin's claims is obviously important to the parties in this case, it

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[6] Alternatively, Seacor submits that if any error was made, it was harmless error within the meaning of Rule 61 of the Federal Rules of Civil Procedure. Since the outcome of the case hinged on credibility determinations, the simple fact is that if the case were returned to the trial court for using the phrase "ordinary care" instead of "slight care," the result would be that the trial court would issue a new opinion making exactly the same findings, but replacing the word "ordinary" with the word "slight." It appears that Ardoin recognizes this, for if he truly believed that the trial court had applied an incorrect standard, he presumably would have sought to remedy the problem in the trial court by seeking an amendment of the trial court's findings under F.R.C.P. 52(b) or by seeking a new trial under F.R.C.P. 59.

presents no issue of importance to the general public. This case does not implicate any of the "character of reasons" traditionally considered by this Court in determining when to exercise its jurisdiction on writ of certiorari.

In short, this case was correctly decided both factually and legally in the lower courts and does not merit review by this Honorable Court. Accordingly, respondent, Seacor Marine, Inc. submits that the Petition for Writ of Certiorari filed by Jody Wayne Ardoin should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on Mr. Richard J. Arsenault, counsel of record for petitioner, by United States mail, postage prepaid and properly addressed this 1st day of February, 1994.

MARK J. SPANSEL
EDWIN C. LAIZER

APPENDIX

1. Rule 52 of the Federal Rules of Civil Procedure:

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

2. The Jones Act, 46 U.S.C.A. § 688:

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

3. The Federal Employers' Liability Act, 45 U.S.C.A § 51:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable

in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and , if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employees of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (Approved April 22, 1908)[45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.